

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 638 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

PATEL DESHRATHBHAI ATMARAM

Versus

STATE OF GUJARAT

Appearance:

Mr.Tirmizi for MR PM THAKKAR for Appellant

Mr.S.R.Divetia, Addl.PUBLIC PROSECUTOR for Respondent

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 23/04/98

ORAL JUDGEMENT (Per Soni J.)

Appellant - orig. accused in Sessions Case No.35 of 1989 is held guilty of offence punishable under sections 302 and 451 of I.P.C. and is ordered to undergo R.I. for life and fine of Rs.5000/-, in default R.I. for two years under section 302 of I.P.C. No separate

sentence is awarded under sec.451 of I.P.C. Said judgment and order is passed by the learned Sessions Judge, Mehsana on 13.6.91.

Facts which led to the prosecution of the appellant ("accused" for short) are as under:-

Accused is residing in the house situated on the south of house of deceased Sitaben, wife of Manilal and mother of Pravinbhai and Kiritbhai. Kuberdas, cousin brother of Manilal is residing in his house situated on the east-north of Manilal's house across the road, leaving about 4-5 houses. Manilal and Kuberdas had sheds in their fields to tether their cattles and those fields are on the north-west side of the house of Manilal. By about mid-night of 18-19.11.88, Pravinbhai, who was sleeping at the first floor of the house, heard scream of his mother. On hearing the scream, he opened the window and peeped outside, where he saw Dashrathbhai (accused) running away from the osri of his house. He came down and his brother Kiritbhai also came down. Other persons residing in the street also gathered. Sitaben was seriously injured and had died. When Pravinbhai went towards the chowk side to enquire where Dashrathbhai had gone, he saw one Ramesh, son of Kuberdas, in the chowk. However, both of them then saw Kuberdas coming from his wada in an injured bleeding condition and going towards his house. Rameshbhai, therefore, held Kuberdas, who had injuries on his face and chest, and brought him at home. On enquiry, Pravinbhai and Rameshbhai were told by Kuberdas that when he was sleeping in his wada, Dashrathbhai Atmaram Patel has caused injuries on his face and chest by a weapon like spear and has run away. Kuberdas was then removed to Kalol hospital. However, on the way to Kalol, he was found dead. In the hospital at Kalol, doctor has also declared him dead on examination. Pravinbhai, therefore, had gone to the Police Station and filed a complaint against Dashrathbhai.

On offence being registered, the same was investigated and on completion of the investigation, accused was chargesheeted in the court of 2nd Joint J.M.F.C., Kalol, who, in his turn, committed the case of the accused to the court of Sessions at Mehsana. The learned Sessions Judge framed charge against the accused under sections 302 and 451 of I.P.C. Accused pleaded not guilty and claimed to be tried. Prosecution led necessary evidence. Defence has also led necessary evidence. After hearing the parties, learned Sessions Judge has recorded the guilt of the accused, as referred above. This judgment and order is assailed in this appeal.

Learned Advocate Mr.Tirmizi for Mr.Thakkar has challenged the conviction on the ground that the learned

Sessions Judge has erred in holding the accused guilty of the offence charged when from the evidence on record the charge levelled against the accused cannot be said to be proved. Mr.Tirmizi further contended that the dying declaration relied on by the learned Judge is a very weak piece of evidence and, therefore, the same ought not to have been accepted in absence of any material corroboration and in particular when there is a variance as to what were the exact words of the deceased. Two witnesses, namely, P.W.2 and P.W.8, before whom the said dying declaration is said to have been made, do not concur substantially or do not concur verbatim as to what was stated by the deceased. Mr.Tirmizi further contended that evidence of Pravinbhai is only based on surmises and smacks of imagination, unrealities and impracticabilities. Mr.Tirmizi contended that immediately on hearing the shout of the mother when Pravinbhai P.W.2 saw accused coming out from the osri and going away, what made him to enquire about the accused. This fact by itself suggests that accused has been wrongly implicated. Mr.Tirmizi further contended that even the medical evidence and in particular that of the forensic science laboratory also, do not support or corroborate the case of the prosecution. Mr.Tirmizi, therefore, contended that the appeal should be allowed and the accused be set at liberty.

Mr.Divetia supports the judgment. Mr.Divetia contended that accused is the uncle of Pravinbhai and there would be no difficulty for him to identify when he has seen him running away from the osri of his house after assaulting or inflicting injuries on Sitaben, his mother. Mr.Divetia contended that dying declaration of Kuberdas made before P.W.2 and P.W.8 is worthy of credence and learned Sessions Judge has rightly accepted the same. Mr.Divetia contended that there is sufficient motive established by the prosecution from the evidence of father-in-law of the accused as well as that of P.W.2 himself. According to the prosecution, cause of commission of this act is that both Kuberdas and his brother Manilal were suspected that they obstruct settlement of accused with his wife and because of this impression in the mind of the accused, he has committed the murder of Kuberdas and when he intended to commit murder of Manilal, it appears that he by mistake committed murder of Sitaben. Thus, there was sufficient motive on the part of the accused to commit the offence. Mr.Divetia further contended that blood-stained clothes of the accused bear the group of the blood which was the group of the blood of deceased Kuberdas and accused has not given any explanation about his blood-stained clothes. Thus, there is no reason to interfere with the

conclusion arrived at by the learned Sessions Judge. Appeal, therefore, should be dismissed.

We propose to deal with this appeal in two parts, firstly, for the murder of Sitaben, mother of P.W.2, and secondly for the murder of Kuberdas, father of P.W.8.

Before we discuss the evidence, we would like to refer to the scene of offence and location of the wada of Kuberdas, house of Kuberdas, house of Pravinbhai and the house of the accused. Prosecution has examined one Dashrathbhai Barot P.W.1, who has prepared the map at Ex.14. There is also a map at Ex.15, wherein location of the house and field of Kuberdas qua the house of Pravinbhai Manilal is shown. Ex.14 is prepared to show the location where Sitaben was murdered while Ex.15 is prepared with a view to show the location where Kuberdas was injured and then reached his home in company of Ramesh and Pravinbhai. In our opinion, Ex.15 gives the full view of the locations as place where Sitaben is murdered is also relevant with the place where Kuberdas is injured. Relevancy of these two maps is with a view to appreciate the evidence of Rameshbhai and Pravinbhai. Referring to map at Ex.15, it is clear that on the south of the house of Sitaben, there is the house of accused. Both the houses had a common wall. There are as many as three other houses on the north of the house of Sitaben i.e. Pravinbhai, and leaving those three houses, there is a public road, and leaving the same, again there is a row of houses. On the east of that public road, on the north of the house of Pravinbhai, there appears row of houses from east to west having their openings probably on the northern side. There is a public road on the north. After leaving the third house on the east of that public road on the north of Pravinbhai's house, 4th house is that of Kuberdas. So, if one wants to go to the house of Kuberdas from the house of Pravinbhai, one will have to come out on the eastern side road of the house of Pravinbhai, go towards north and after leaving that public road, he has to go ahead and then turn to eastern side and after leaving three houses, 4th house is of Kuberdas. On the western side of the public road, leaving houses of Pravinbhai and others, there is a north-south public road. On the west of that public road, there appears the wada of Manilal Nathubhai. Leaving that wada of Manilal, there is again a wada of Mangalbhai and on the west there is a field of one Patel Kuberdas Choudhari, wherein there is a wada, and the scene of offence for inflicting injuries on Kuberdas is located there. It is in evidence that distance between wada of Kuberdas and house of Kuberdas is of about 5 to 7 minutes walk. It is also in the evidence that it is at a distance of about 200 meters or so. House of Pravinbhai

has an opening on the south, but has no opening on west, though on the western side there is a row of houses on public road. House of Dashrathbhai had openings on both the sides i.e. on west and east. Keeping this location in mind, we will now consider the contentions raised by the learned Advocates.

It is the case of the prosecution that on hearing shouts of Sitaben, Pravinbhai, who was sleeping at the first floor of the house, wake up and opened the window and he saw neighbour Dashrathbhai going out from his osri. Then he came down and found that his mother was bleeding and on hearing his shouts, his brother Kiritbhai also came down and other persons of the locality gathered. On having found his mother injured, he in company of Ramanbhai, Arvindbhai and Harjivanbhai came out of the house to find as to in which direction Dashrathbhai had gone. When he had seen his mother, she was already dead. When he came out of the house, he saw the rear door of the house of Dashrathbhai opened. When he went in company of those others on the northern side, he saw Rameshbhai P.W. 8 coming from the northern side and at that very time, he also saw Kuberdas coming in a bleeding condition from his wada and going towards his house. Kuberdas was then taken to home where on enquiry, Kuberdas told that he is assaulted by Dashrathbhai. From there, they have taken Kuberdas to Kalol Hospital, where it appears that they have reached by about 2.00 AM on 19.11.88.

Question is whether the story advanced by Pravinbhai P.W.2 that on hearing shout of his mother when he peeped out of his window he saw Dashrathbhai coming out of the osri is acceptable or not. Incident took place at about 12.30 midnight. There is nothing on record to show that on the public road in front of the house of Sitaben, there was any street light. According to Pravinbhai P.W.2, there was light in his osri. Question is whether Sitaben was sleeping in her osri with light on ? Whether any person will commit offence at night with lights on ? Whether any culprit will leave the evidence behind him so that he may be properly traced or identified ? Amongst all, the important question is whether Pravinbhai P.W.2 has unmistakably identified Dashrathbhai as a person, if at all he has seen someone coming out of the osri ? If we read the evidence of Pravinbbai P.W. 2 minutely as to what he has stated in examination-in-chief, the conclusion would be that he has not seen any person going out of the osri, muchless Dashrathbhai. We will quote from his evidence:-

"On that day I heard the shout of my mother at about 12.30 at night. I, therefore, wake up and opened the window of my room. At

that time, I saw from my window my neighbour Dashrathbhai going out from my osri. I, therefore, came down. After coming down, I saw my mother lying in a cot in osri. She was bleeding from her mouth. Therefore, I shouted and my brother Kiritbhai, followed by his wife and my wife from my room, came down. From neighbourhood, Harjivanbhai, Ramanbhai and Arvindbhai and other residents of Mohalla also came. I saw a deep stab injury on the chest of my mother. I saw an injury in the mouth of my mother and it was bleeding. I, therefore, in company of Ramanbhai, Arvindbhai and Harjivanbhai, came out of the house to see in which direction Dashrathbhai had gone".

From this part of evidence, it is clear that when this witness saw from the window of his room Dashrathbhai going out of his osri, he has not shouted. We may make it clear that it is the case of the prosecution that Pravinbhai's father and Kuberdas are cousins of Dashrathbhai and they are not on good terms. According to the prosecution, accused has an impression that these two brothers, namely, Manilal and Kuberdas, are not allowing the settlement with his wife. It is also clear from the prosecution evidence that this Manilal and Kuberdas are not on visiting terms with Dashrathbhai accused. The question, therefore, is: if a person who is inimical to another and with whom one is not on visiting terms and when he hears the shouts of mother and wakes up and sees such a person going out of the house, would he not immediately shout the name of that person ? In fact, immediately on coming downstairs, he will rush to the house of that man and on his failure to find him in the house, he may go for the search of that man in any direction he may deem fit. This has not happened in the instant case. When Pravinbhai saw accused coming out from his osri, he has not shouted and if he has not shouted, then at least he will enquire from his mother as to what had happened, why there is a shout by his mother. Immediately on coming downstairs, he will again tell everyone present and concerned that he has seen Dashrathbhai going out of his osri, but this does not appear to be the conduct of Pravinbhai. On the contrary, he, in the company of Ramanbhai, Harjivanbhai and Arvindbhai, goes towards the public road on the north of his house to enquire in which direction Dashrathbhai has gone. This again, in our opinion, is not a natural conduct of a son of the victim.

It is in evidence that one of the brothers of Pravinbhai commutes from Ahmedabad and he used to return at night by about 2.00 to 2.30 A.M. In the

cross-examination, Pravinbhai has admitted:-

"There is an iron gate to my house to get out of the house. There is stopper on both outside as well as inside of the door. There are hooks on both the sides to apply lock. For the security of our house, when we go to bed at night, we did not apply lock because when my brother return back at night by 2.00 to 2.30 AM, he may enter the house without disturbing the sleep of anybody and on his coming in the house, he used to lock the gate, put off light and go to bed".

When the mother is sleeping in the osri near the gate, it is not believable that light will remain on till the brother comes at night. Even if there be a light in osri, as stated earlier, there is nothing on record to show that there was a light on the road. A person coming out of the osri of Pravinbhai will be immediately on the road, which is in north-south direction. So, on coming on road from osri, person will immediately start going in either direction of north or south and he will be away from the area of the house and, in our opinion, it will be difficult for anyone to identify a person going away in darkness. One can see that something is going, some movement is there, but unless there is some light to mark movement of the person, it will be difficult for anyone to identify it. Therefore, in absence of any evidence as to the light on the street, say of P.W. 2 having seen Dashrathbhai coming out of the osri and going away is a doubtful proposition. Together with this, the conduct of Pravinbhai also, in our opinion, causes further suspicion about the identity of the accused by Pravinbhai.

Accused is arrested in the evening of that very day i.e. 19.11.88. His clothes are found to have been stained with blood. His clothes are found stained on sleeves, chest portion, belly portion as well as back portion also. His banyan is also found stained with blood near the neck as well as belly portion. Blood group found from his clothes is of 'B' group while blood stains on the cloth of deceased Sitaben are found to be of 'O' group. No doubt, accused in his further statement has not explained; nor has given any reasonable explanation as to how his clothes are found to be stained with blood. His defence is that such clothes are not seized from him. Despite this, we are of the view that person if he has committed such an offence and if his clothes are stained with blood, would he move with these clothes on till evening to allow the Police to come, arrest him and seize the clothes. This fact smacks of improbability and, in our opinion, the prosecution has failed to prove beyond reasonable doubt the involvement of the accused for the murder of Sitaben.

Prosecution has relied on find of one bead of Rudraksh. It was also stained with blood of 'O' group. According to prosecution witnesses, said bead was put on by the accused and it belonged to the accused. Accused has denied the ownership thereof. There is no special mark of identity on that bead; nor the prosecution has alleged any special mark of identity to establish the ownership of the accused. Simply because the bead stained with blood of 'O' group is found, that cannot lead to infer that accused has come at the scene of offence and committed the alleged act of assault.

This brings us to consider whether the prosecution has proved beyond reasonable doubt that it is the accused who has inflicted injuries on Kuberdas, as a result of which he has died. To prove this fact, prosecution relies on two circumstances; namely, the oral dying declaration of Kuberdas in presence of Pravinbhai and Rameshbhai and the clothes of the accused with stains of blood of group of Kuberdas. We may say that the accused has disputed seizure of clothes, which are stained with blood. We also have our own doubt for the simple reason that if a bush-shirt is put on and it is blood stained on chest and belly portion, how a banyan which is below the bush-shirt is also found stained with blood at the neck as well as belly portion. When an offence is committed, normally the persons are facing face to face. There does not appear any probability or suggestion by the prosecution by way of explanation as to how the clothes of accused were stained with blood from the back side. No doubt, these things are so unfathomable to guess, but at least they are required to be probable.

No one has seen the accused inflicting injury on Kuberdas. On the eastern side of the wada of Kuberdas, there is wada of one Mangalbhai and on the eastern side of said Mangalbhai's wada, there is wada of Manilal, husband of Sitaben. Kuberdas is injured in his wada and by about 1.00 AM, he starts from his wada to go home. He does not appear to have shouted; otherwise at least Manilal, who was there in the wada as per the evidence of Pravinbhai P.W. 2, would have known. That apart, Kuberdas has come near public street on the north of the row of the houses of Pravinbhai, where he simultaneously saw Rameshbhai and Kuberdas. When Pravinbhai saw Rameshbhai, Pravinbhai was in company of Ramanbhai, Arvindbhai and Harjivanbhai, as they had come there to enquire or search Dashrathbhai. It is not the case of the prosecution that Ramanbhai, Arvindbhai and Harjivanbhai also reached near Kuberdas. It is only Pravinbhai and Rameshbhai reached near Kuberdas, assisted him and took him at home. After going at home, it is

enquired of from Kuberdas as to who injured him. Before we discuss that statement, which is now considered and treated by the prosecution as the dying declaration, we will first consider and discuss about the presence of Rameshbhai.

Rameshbhai P.W.8 in his evidence has stated to the effect that he is an ordinary resident of Ahmedabad. He is a mill employee. He has taken leave from mill company and had come to his village Dhanaj since morning of 18.11.88. He has taken his supper before 9.00 or 9.30 at night. By about 9.00 or 9.30 P.M., his father had left for wada and he used to sleep at night in the osri of his house. According to him, by about 12.30 night, he had come out of his house to pass urine. At that time, he heard noise like crying at the house of his masa Manilal and he was going towards the house of Manilal. When he reached near the chowk, he met Pravinbhai, his uncle Harjivanbhai and Ramanbhai. He enquired as to what happened. By that time, he saw his father coming from wada in a bleeding condition and going towards his house. He ran and caught hold of his father and enquired as to what had happened. This Rameshbhai P.W.8 is an ordinary resident of Ahmedabad and by chance, he has come to village Dhanaj on 18.11.88. He has not disclosed the reason why he has come to Dhanaj from Ahmedabad. Ordinarily, an employee will not take leave for a fancy purpose because leave is a precious right of an employee which he normally would not like to waste, as saving thereof can always be used in emergencies. If leave is wasted unnecessarily, then in cases of emergency the employees are required to take leave without pay. They also incur the wrath of their employers, if they take leave without any justifiable cause. When Rameshbhai P.W. 8 says that he took leave on 18.11.88, he must have some reason for the leave and there would be no reason for him not to disclose the same before the court. Case of the defence against this Rameshbhai is that he has not come to village Dhanaj on that day and after the incident, he was sent for and called in a rickshaw. He had denied the suggestion that his cousins Rajendra and Jasubhai fetched him in a rickshaw from Ahmedabad, after informing him about the assault on his father, and he came on a scooter of his friend at Kalol hospital. Apart from this, as discussed in the beginning, if any cry was there in the house of Pravinbhai, it will be heard in number of other houses if it can be heard by Rameshbhai in his house, which is located sufficiently away with number of houses in between. Firstly, in our opinion, there was no reason for him to come near the chowk from his house. The fact of locating or identifying the cries at midnight from the house of Manilal, his masa, is also

highly suspicious because it would be very difficult for him to say that the noise, which was coming at night, was from the house of his Masa. Thus, in our opinion, presence of Rameshbhai at Dhanaj at the night of 18.11.88 is also highly doubtful.

Keeping this in mind, we will now consider the dying declaration of deceased Kuberdas. We may make it clear that in a criminal trial, guilt can be proved by a fact which directly links the commitor of the act with the act. If by a fact of dying declaration the guilt is established, then, in our opinion, on a sole piece of evidence of dying declaration the accused can be convicted. To seek corroboration is a rule of prudence. Rule of law is to have an evidence to connect the accused with the crime. If dying declaration is convincing and credible, even if not corroborated by any other independent piece of evidence, the same can be acted upon and conviction based on that sole piece of evidence need not be bad. Keeping in mind this aspect, we shall have to decide whether the dying declaration relied on by the prosecution in the instant case is untainted, convincing and reliable. In our opinion, it is not. Kuberdas was asked by Rameshbhai, his son, as to what happened and Kuberdas has replied. As per Rameshbhai P.W.8:-

"when he (Kuberdas) was sleeping in his wada, accused Patel Dashrathbhai came and inflicted injury on face and cheek with a weapon like Bhala, saying that he (Kuberdas) has spoiled his (accused's) matrimonial life. So saying, he (accused) ran away".

Undisputedly, Pravinbhai P.W, 2 was there and he has stated as under:-

"When Rameshbhai asked Kuberdas as to what happened to him, he has replied that he (Kuberdas) was sleeping alone in the wada. At that time, Dashrathbhai Atmaram came and while inflicting spear blow on his chest and mouth, was telling that he has spoiled his matrimonial home. So saying, he ran away".

Kuberdas has given the cause of his injury in presence of Rameshbhai P.W.8 and Pravinbhai P.W.2. It is not the case of the prosecution that Kuberdas has separately replied to Rameshbhai and Pravinbhai. So, what Kuberdas stated was heard by Rameshbhai and Pravinbhai in response to the question put by Rameshbhai. Rameshbhai refers to accused as Patel Dashrathbhai while Pravinbhai refers to Dashrathbhai Atmaram. Ramesh refers to weapon like bhala and inflicting blow of bhala, while Pravinbhai refers to bhala alone. Rameshbhai refers to injury on face and cheek while Pravinbhai refers to injury on chest and face. If Kuberdas has replied within the hearing of both

Rameshbhai and Pravinbhai the cause of his injury, how would above variance will come. Supreme Court in the case of Ram Nath Madhoprasad vs. State of Madhya Pradesh (A I R 1953 S.C. 420) has observed in para 14 that "unless one is certain about the exact words uttered by the deceased, no reliance can be placed on verbal statements of witnesses and such oral declarations made by a deceased". This variance, in our opinion, by itself is no ground to reject the say, but the presence of Rameshbhai also, in our opinion, is a suspicious one. Coupled with this, there is an additional fact that the complaint is given at about 6.00 AM on 19.11.88. Injured was taken to the hospital by about 2.00 AM on 19.11.88 and there on enquiry by the doctor as to the history of the incident, name of the accused was not disclosed. Dr.Manisha P.W. 4 was, therefore, obliged to write in case papers as 'somebody', instead of naming one who has caused the injury. She has specifically stated that she did enquire from those who brought him to the hospital. However, she was not disclosed the name of the assailant by those relations who brought Kuberdas in Hospital. Thereafter, what the complainant's side did in between 2.00 AM and 6.00 AM is not known. When before the doctor the name of the assailant is not disclosed, how the same came to be disclosed before the Police at 6.00 AM ? At 2.00 AM when doctor enquired about the name of the assailant, in our opinion, it was the first opportunity for the prosecution witnesses to disclose the name of the appellant and the same was not disclosed. Then, how that name came to be disclosed before the Police in the complaint at 6.00 AM ? In our opinion, the things would be otherwise if nothing would have been stated before the doctor or doctor would not have enquired about the name of the assailant. This circumstance also, in our opinion, makes the case of the prosecution doubtful and suspicious one. In the dying declaration if the name of the accused was disclosed, there was no earthly reason not to tell the name of the assailant to the doctor. Thus, in our opinion, prosecution has failed to prove beyond reasonable doubt the charges levelled against the accused. Accused would, therefore, be entitled to the benefit of doubt. The learned Sessions Judge has, therefore, erred in holding the accused guilty as prosecution has failed to prove the charges beyond reasonable doubt.

In the result, the appeal is allowed. The order of conviction and sentence is set aside. Appellant be set at liberty forthwith, if not required in any other case. Fine, if paid, be refunded.
